Wellman Thermal Systems Corporation and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, and Local 1793. Cases 25-CA-14731(E) and 25-CA-14761(E)

### 15 March 1984

#### **DECISION AND ORDER**

## By Chairman Dotson and Members Zimmerman and Hunter

On 27 July 1983 Administrative Law Judge Leonard M. Wagman issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

# **ORDER**

It is hereby ordered that the petition of the Respondent, Wellman Thermal Systems Corporation, Shelbyville, Indiana, for an award under the Equal Access to Justice Act<sup>5</sup> be dismissed.

<sup>1</sup> Also see Wellman Thermal Systems Corp., 269 NLRB 159, issued today on an unrelated aspect of this case.

### SUPPLEMENTAL DECISION

### (EQUAL ACCESS TO JUSTICE ACT)

#### STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. These consolidated cases were scheduled for hearing before me on November 15, 1982, in Shelbyville, Indiana. On November 17, 1982, the record was opened and, without taking any testimony, I tentatively approved a

settlement agreement between the Respondent and the Union subject to objection of the counsel for the General Counsel. On November 30, 1982, the General Counsel filed a motion requesting that the settlement be rejected. On December 28, 1982, I issued an order dismissing the General Counsel's motion to reject the settlement and reaffirmed my approval of the settlement.

On January 11, 1983, the General Counsel filed a request for special permission to appeal, requesting the Board to set aside my order approving the settlement on the ground that it failed to provide immediate reinstatement of alleged unfair labor practice strikers and adequate backpay. The Board denied the General Counsel's request for special permission to appeal on February 28, 1983.

The Respondent, Wellman Thermal Systems Corporation, herein called Wellman or Respondent, now seeks legal fees in the amount of \$52,177 and \$5,980 respectively, for its counsel Barnes and Thornburg, and McNeely and Sanders, under the Equal Access to Justice Act, herein called EAJA, Pub. L. 96-481, 94 Stat. 2325, 5 U.S.C. § 504 and § 102.143 et seq. of the Board's Rules and Regulations. The Respondent also filed a motion to withhold confidential financial information from public disclosure and a motion to increase the maximum rate of attorneys' fees. No opposition has been filed to the motion to withhold confidential financial information from public disclosure and that motion is hereby granted. The motion to increase the maximum rate of attorneys' fees is hereby denied.

#### Issues

The following issues are presented:

A. Is the applicant an eligible party, under the Equal Access to Justice ACT (EAJA)?

B. Is the applicant a prevailing party under EAJA?

- C. Was the position of the General Counsel substantially justified?
- D. May the applicant recover fees incurred prior to December 1, 1982?
- E. May the applicant recover fees incurred in researching and prosecuting its EAJA application?
- F. To what, if any, reasonable fees and expenses is applicant entitled?

# The Applicant's Eligibility

At the outset I note that the settlement agreement includes the following two paragraphs:

The Charged Party agrees that this Settlement Agreement does not constitute and shall not be used as evidence in any proceeding to support a claim that the Charged Party has prevailed herein, and the Charged Party further agrees to waive any and all entitlement to attorney fees, costs, and other expenses under or pursuant to the Equal Access to Justice Act

By the execution of this Settlement Agreement Charged Party does not admit the commission of any unfair labor practice and Counsel for General Counsel of the National Labor Relations Board

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<sup>&</sup>lt;sup>2</sup> Chairman Dotson finds that the Respondent expressly waived any rights under the Equal Access to Justice Act in the settlement agreement for these consolidated cases. In his view, the waiver covers the underlying proceeding leading to the settlement agreement, the Motion for Special Permission to Appeal, and the petition for legal fees herein. Accordingly, he does not reach or express any view on the other issues presented by the judge's opinion.
<sup>3</sup> We correct the following inadvertent errors in the judge's decision:

<sup>&</sup>lt;sup>3</sup> We correct the following inadvertent errors in the judge's decision: (1) At the second paragraph of the section titled "The Applicant's Eligibility," the judge should have cited Sec. 102.143(g) of the Board's Rules and Regulations, rather than Sec. 102.43(g); and (2) at the fourth paragraph, final sentence, of the same section, the judge should have stated that "the settlement was *not* based on a substantial probability of prevailing."

ing."

4 In light of our dismissal of the petition herein, we hereby deny the Respondent's petition to increase the maximum rate of attorneys' fees.

5 U.S.C. § 504.

does not admit that any of the allegations of the complaints in the above referred to cases were made without just and reasonable cause.

I find that the first quoted paragraph constituted an express waiver of whatever entitlement the Respondent might otherwise have had under the Equal Access to Justice Act (EAJA). However, even if the quoted language did not amount to a waiver, I find no merit in the Respondent's application.

The Respondent's eligibility to receive relief under the EAJA is in serious doubt. Section 504 of the EAJA requires, within 30 days of a final disposition in the adversary adjudication, that a party seeking an award of fees and other expenses submit to the Board an application showing that the party is a prevailing party and is eligible to receive an award under this section. Section 504 limits eligibility to, inter alia, a corporation, partnership, association, or organization, whose net worth does not exceed \$5 million and who had no more than 500 employees at the time the adversary adjudication was initiated. Section 102.43(g) of the Board's Rules and Regulations provides:

The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless such treatment would be unjust and contrary to the purposes of the Equal Access to Justice Act (94 Stat. 2325) in light of the actual relationship between the affiliated entities. In addition financial relationships of the applicant other than those described in this paragraph may constitute special circumstances that would make an award unjust.

Wellman's records indicate that at the time the Regional Director issued the complaint in the instant case, September 30, 1982, it employed 425 employees at its Shelbyville, Indiana and Torrence, California facilities, and had a net worth of less than \$5 million. I also find from Wellman's records that it is affiliated with Wellman PLC, a United Kingdom corporation. However, those records did not disclose either the latter firm's employee complement or its net worth. By this omission, Wellman has failed to show that it is an eligible party under EAJA. That Wellman PLC is incorporated in the United Kingdom does not entitle the applicant to an exemption from the burden imposed by the EAJA or the Board's Rules and Regulations applied to EAJA.

However, assuming that Wellman can meet EAJA eligibility requirements, I now turn to the merits of the application. Wellman asserts that it was a prevailing party because the settlement agreement was approved by me and the Board denied the General Counsel's request for special permission to appeal. Wellman therefore contends that the General Counsel's position in opposing and ap-

pealing the order affirming the settlement was not substantially justified. The courts have found applicants under EAJA to have been a "prevailing party" even where the case has been settled, dismissed, or resulted in a consent decree. Spencer v. NLRB, 111 LRRM 2065, 2067, 97 LC ¶ 10,068 (D.C. Cir. 1982).

Section 504(a)(1) of EAJA provides that an award shall be made to a prevailing party unless "the position of the agency as a party to the proceeding was substantially justified or . . . special circumstances make an award unjust." Under that provision, the burden of establishing substantial justification is on the Board's General Counsel. The test of whether or not the General Counsel's opposition to the settlement agreement herein was justified is one of reasonableness. To defeat the award, the General Counsel must establish that his position had a reasonable basis in fact and law. That the General Counsel failed in his effort to have the settlement set aside does not give rise to the presumption that his position was unreasonable or that his decision to challenge the settlement was based on a substantial probability of prevailing.1

Comparing the facts and holding in Clear Haven Nursing Home, 236 NLRB 853 (1978), where the Board rejected a settlement agreement, with the facts in the instant cases, the General Counsel had a substantial basis for expecting the same result here. As in Clear Haven, the General Counsel faulted the settlement in the instant case on the ground that the alleged unfair labor practice strikers did not receive immediate reinstatement, while their replacements continued to work. This contention finds arguable support in Clear Haven.

A serious defect which the Board perceived in the Clear Haven settlement was "the absence of any effective notice to employees concerning the rights of unfair labor practice strikers, including, inter alia, their right to full reinstatement even if their employer has hired replacements and must discharge those replacements." Id. at 854. Here, the approved settlement, by permitting the Respondent to reinstate the alleged unfair labor practice strikers over a 10-month period, also arguably contradicted the same policy.

Another major flaw in the Clear Haven settlement was that the respondent would have paid no backpay. The Board found this to be a significant ground for rejecting the settlement. In the instant case, the General Counsel objected strenuously to the monetary settlement citing Board policy announced in Clear Haven. The General Counsel contended that the backpay was grossly inadequate and urged rejection of the settlement on that ground. According to the General Counsel, the ultimate backpay liability under the approved settlement would total between \$170,300 and \$1,879,000 depending upon the rate of recall of the alleged unfair labor practice strikers. However, the settlement provided for only a small fraction of \$170,300 minimum, in actual payments. Here again the General Counsel had substantiated cause to object.

<sup>&</sup>lt;sup>1</sup> S. Rep. No. 96-254, 96th Cong. 1st Sess. 6-7; 14-15 (1979). H.R. Rep. No. 96-1418, 96th Cong. 2d Sess. 10-11 (1980). Spencer v. NLRB, supra at 2066.

Finally, the General Counsel sought rejection of the settlement on the ground that the "backpay" provided by the settlement was not backpay but was, rather, unemployment compensation or supplemental unemployment benefits from governmental agencies to which the employees were contractually entitled. Under these circumstances, there was certainly a substantial justification for the General Counsel's objection to the settlement.

Also in Clear Haven, as here, a voting majority of the employees voted to accept the settlement despite the inadequacies mention. However, as the Board recognized in Clear Haven, neither the union's willingness to join in the settlement, nor the express acquiescence of its membership, provided the gauge for evaluating the merits of the settlement. Instead, it was the Board's discretion which provided the measure of adequacy required for approval of the settlement. The Board's determination in Clear Haven provided the General Counsel with cause to believe that the settlement here would not substantially remedy the unfair labor practices alleged in this complaint, and that the Board would, therefore, reject it.

The Respondent in its application for fees divides its request for fees into two parts; first, for fees incurred from October through November 1982, during its preparation for the unfair labor practice hearing; and second, for fees incurred from December 1982 through March 1983, when it sought Board acceptance of the settlement.

The Respondent was a prevailing party only with respect to the settlement. Therefore, none of the fees incurred prior to December 28, 1982, the date of issuance of my order reaffirming my approval of the settlement, would be allowable in any event. If the Respondent were entitled to fees they would include fees incurred in researching and prosecuting this EAJA application for fees. As I have found that the General Counsel's position was substantially justified however, the Respondent is not entitled to any fees and this application for fees under the Equal Access to Justice Act is denied.

On these findings and conclusions and on the entire record, I issue the following recommended<sup>3</sup>

#### ORDER

The General Counsel's motion to dismiss is granted, and the application of Wellman Thermal Systems Corporation for an award of fees under the Equal Access to Justice Act is denied.

<sup>&</sup>lt;sup>2</sup> Tyler Business Services v. NLRB, 111 LRRM 3001, 3003 (4th Cir. 1982). See also Conference Report on the EAJA HR 96-1434 Sept. 30, 1980, p. 21.

<sup>&</sup>lt;sup>8</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.